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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

JAMES S. DEAN and SHERLENE T. DEAN,

Plaintiffs and Appellees,

vs.

KANG SIK PARK, trustee of the KANG SIK PARK REVOCABLE TRUST, and MARSHA K. PARK,

Defendants and Appellants.

Appellate No. 20110427

District Court No. 090908746

BRIEF OF APPELLEES JAMES S. DEAN AND SHERLENE T. DEAN

On Appeal from the Third Judicial District Court of Salt Lake County, Utah
Honorable John Paul Kennedy

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BRIEF OF APPELLEES JAMES S. DEAN AND SHERLENE T. DEAN

JURISDICTION

This is an appeal by Defendants Kang Sik Park, Trustee of the Kang Sik Park Revocable Trust ("Dr. Park"), and Marsha K. Park ("Mrs. Park") (collectively, the "Parks"), from a Judgment by the District Court, entered following a trial of the matter to the district court. Jurisdiction to hear this appeal is conferred on the Utah Court of Appeals pursuant to Sections 78A-3-102(3)(j), -3-102(4), and -4-103(2)(j).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

Issue on Appeal No. 1: Whether the trial court erred in determining that the Parks had failed to meet their burden of proving "mutual acquiescence" by the parties and their predecessors that the fence was the boundary between their respective lots.

Standard of Review: The trial court's findings of fact will not be reversed unless they are "clearly erroneous." *RHN Corp. v. Veibell*, 2004 UT 60, ¶22, 96 P.3d 935. Appellants must marshal the evidence in support of the trial court's findings, and demonstrate that the "trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)).

Issue on Appeal No. 2: Whether the trial court erred in determining that the Parks had failed to meet their burden of proving that they had occupied the area between their record boundary line and the fence for the requisite period of time.

Standard of Review: The trial court's findings of fact will not be reversed unless they are "clearly erroneous." *RHN Corp. v. Veibell*, 2004 UT 60, ¶22, 96 P.3d 935. Appellants must marshal the evidence in support of the trial court's findings, and demonstrate that the "trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Deans do not believe any Constitutional provisions, statutes, or rules are determinative or of central importance to this matter.

STATEMENT OF FACTS

This case involves a boundary dispute between owners of adjoining residential properties in the Federal Heights area of Salt Lake City. The Deans own Lot 9, having acquired it in April 2005 (R. 296:32, Ex. 4), and Dr. Park owns Lot 8, having acquired it in 1988 (R. 296:168). Intending to replace the wood fence located near the boundary line between the Deans' and Parks' lots, the Deans obtained a survey. (R. 296:36-37; Ex. 3.) The survey reflected that the existing wood fence was located inside the record boundary line of the Deans' lot at certain points, resulting in a narrow long triangular shaped parcel between the Deans' fence and their record boundary line (the "Disputed Parcel"). (Ex. 3.) In connection with their anticipated new fence, and to protect their house, the Deans also desired to remove certain "trash" trees (Siberian or Chinese elms) that were growing in the Disputed Parcel. (Ex. D.)

After it became apparent that the Parks disputed the Deans' ownership of the Disputed Parcel, and also refused to allow the Deans to remove the Siberian elms, the Deans filed this action to quiet title to the Disputed Parcel. (R. 1-14.) Alternatively, the Deans sought an order allowing them to remove the Siberian elms, which threatened their house and property.

(R. 6-7.) The Parks counterclaimed, seeking title to the Disputed Parcel under the doctrine of boundary by acquiescence. (R. 20-23.)

After a bench trial, District Court Judge Kennedy issued comprehensive Findings of Fact and Conclusions of Law. (R. 259-80.) Judge Kennedy concluded that the Parks had failed to meet their burden of proving two elements of the boundary by acquiescence claim, i.e., mutual acquiescence to the fence as the boundary, and occupation of the ground up to the fence. (R. 272-77.) Judge Kennedy also found, alternatively, that the Siberian elms constituted a private nuisance, and he would authorize the Deans to remove them, if they did not already have the right to do so based on ownership of the property.[1] (R. 277-79.)

In 1977, Mrs. Park (previously Marsha Morrison) and her prior husband, Dr. Jed Morrison, acquired Lots 8, 9 and 10, of Federal Heights Plat "D." (R. 296:91.) They built a house on Lot 10, and Mrs. Park resided there until 1983. (R. 296:92.) In a divorce proceeding, Mrs. Park obtained title to Lots 8 and 10, and Jed Morrison took title to Lot 9. R. 296: 2-93. In 1983, Jed Morrison conveyed Lot 9 to David Clark. (R. 244.)

In 1984, Mr. Clark, a professional architect, designed and built a home on Lot 9.[2] (R. 264.) Prior to Mr. Clark's construction, the topography between Lots 9 and 8 was a gentle slope, east (Lot 9) to west (Lot 8). (R. 296:95-97; Ex. A.) In connection with the construction of the house, Mr. Clark brought in soil to raise and level his lot. (R. 296:98-99.) This created

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[1]This issue has not been addressed by the Parks in their appeal.

[2]As noted by Judge Kennedy, Mr. Clark was unable to testify at trial due to various ailments. (R. 264.)

a steeper drop-off between Lots 9 and 8. At the street (on the north), the drop-off was as much as eight feet by Mrs. Park's estimate. (R. 296:100-01.) Near the southwest corner of the house, where the fence began, the drop-off was about three feet, and the slope diminished toward the south (rear) until the two lots were essentially level with each other. (R. 296:35-36, 102-03.)

The Declaration of Building and Use Restrictions applicable to the lots required that each dwelling have a minimum side setback of at least eight (8) feet, and the combined side setbacks had to be at least twenty (20) feet. Ex. 2. Salt Lake City's zoning ordinance requires ten foot side yard setbacks, but defers to the recorded plat if it deals with the issue. (R. 244, 249.) The house constructed by Mr. Clark was situated so that the sides were located approximately ten feet from each side boundary line, which was in compliance with the side setback requirements. (Ex. 3.)

Mr. Clark also constructed a wood fence, which was the fence the Deans sought to replace. (R. 296: 102.) The wood fence was not located on the record property line. (Ex. 3.) Instead, it began near the southwest corner of his house (about 3.5 feet inside the record property line), jogged slightly toward the house (about 4.13 feet inside the record property line), and then continued toward the rear (south) of the lot. (*Id.*) There was no fence along the front portions of the boundary line. (Ex. 3, 7.) As the wood fence approached the rear of the lot, it got closer to the record boundary line, until, approximately 35 feet north of the south boundary line of Lot 9, the wood fence encountered and then ran parallel to a chain link fence

until reaching the south boundary of the lot. (Ex. 3.) There was essentially no space between the chain link and wood fences. (R. 296:55-56.) The chain link fence had been installed by Mrs. Park and Dr. Morrison when they owned all three lots (R. 296:129, 131), and was (and is) located on the record property line between Lots 8 and 9. (Ex. 3.)

Mr. Clark's clear purpose in locating the fence where he did was to provide privacy for his backyard and patio, and the trial court so found. (R. 266-67.) The fence was located at the crest of the slope between the two lots. (*Id.*) Had the fence been placed on the record boundary line, which was near the bottom of the steep slope, the fence would have extended above the grade of Lot 9 by only about three feet. (R. 296:176.) It was also easier to build the fence on top of the slope. (R. 266, 274.) Judge Kennedy specifically found, "[T]he main purpose of Clark's wood fence was privacy and ease of location rather than to mark a boundary between the lots." (R. 267.)

Also in 1983, Mrs. Park constructed a new residence on Lot 8. She lived in the house on Lot 10, and then moved into the new residence on Lot 8. (R. 296:96-98.) Thus, she observed the construction of Mr. Clark's home and the wood fence. (R. 296:96-98.) In 1986, Mrs. Park built a wood fence that ran perpendicular to, and abutted Mr. Clark's fence at its north end. (R. 296:120.) She installed a gate in her fence, to provide access to her back yard. Mrs. Park testified that the reason she installed the wood fence was to keep Mr. Clark's dogs out of her back yard on Lot 8. (R. 296:120-21.)

The trial court found that Mrs. Park had some degree of knowledge regarding where the record boundary line was located. (R. 268.) This was based upon her experience as a real estate agent, information from the plat map (when she and Dr. Morrison purchased the three lots), and construction of homes on Lots 8 and 10. (R. 268-69.) She was the owner, with Dr. Morrison, of Lots 8 and 9 at the time the chain link fence (located near the basketball court) was constructed, and the chain link fence is located exactly on the record property line. (R. 268-69.) While Mrs. Park testified that she believed Mr. Clark's fence was located on the boundary line, the Court specifically found that her testimony was not credible. (R. 269.)

The fact that the fence was not located on the property line was visually apparent to even the casual observer. Looking from the front of the house to the rear along the property line, one can see that the fence does not follow what otherwise appears to be the property line, but in fact jogs around the trees. (Ex. 7 and 8.)

In 1988, Mrs. Park conveyed Lot 8 to Dr. Park, and moved out of the house. (R. 296: 110.) In 1991, Mrs. and Dr. Park married, and she returned to live at Lot 8 in 1993. (R. 296: 110.) Since 1988, Lot 8 has been owned by Dr. Park. (R. 296:168.)

Neither Mrs. Park nor Dr. Park ever discussed the location of the wood fence with Mr. Clark (R. 296:107-08, 150), or any later owners of Lot 9 (R. 296:122, 150-51), until they were notified of the Deans' intentions to tear down the wood fence and replace it with a new fence on the record boundary line. (Ex. D.)

While there was evidence to the effect that Mr. Clark and the successor owners of Lot 9, including the Deans, had not entered on the Disputed Area for an extended period of time, the testimony and evidence was also quite clear that the Parks did not use and occupy the Disputed Area for a period of twenty years or more. The Parks did not treat any portion of the Disputed Area as part of their own backyard. There were no sprinkler heads or lines in the Disputed Area. (R. 296:116, 162) Any watering or fertilizing of the Disputed Area by the Parks was purely incidental to the Parks' watering or fertilizing of their own backyard, and was not intentional (R. 270), much the same as homeowners water and fertilize streets and sidewalks unintentionally.

Mrs. Park testified that at no time did she, or anyone at her request, plant any trees or shrubs in the Disputed Area (R. 296:103-05), nor did she plant or cause to be planted any grass in the area. (R. 296:107.) However, Mrs. Park claimed that she and her children planted flowers in one portion of the Disputed Area, and occasionally weeded the area, during the period from 1984 to 1988. (R. 296:109-113.) Since 1993, however, Mrs. Park has not planted any flowers in the area; in fact, she has "hardly ever stepped outside." (R. 296:113.)

Dr. Park asserted that in 1988, he planted one fruit tree in the Disputed Area, but it later died. (R. 296:158-59. Other than that single tree, Dr. Park conceded that he planted no trees or shrubs in the Disputed Area. (R. 296:159.) Dr. Park asserted that he planted vegetables, such as zucchini, watermelon and strawberries, in the Disputed Area during the period from 1988 to 2007. (R. 296:163-64). That testimony was contradicted by Mrs. Dean's

testimony that she had never seen Dr. Park (or Mrs. Park) gardening. (R. 296:174.) Dr. Park's assertion was also contradicted by the absence of any evidence of cultivation, the fact that nothing would grow among the trees (as there was no sun), and the invasive roots. (R. 296:174-75; Ex. 12-28.) Judge Kennedy specifically refused to give any weight to Dr. Park's testimony on this issue. (R. 270).

Numerous photographs of the area depicted a wooded and unkempt area, filled with underbrush and weeds, which had clearly not been maintained as either a lawn or garden for an extended period of time. (Ex. 12 through 28.) In short, the physical appearance of the Disputed Area contradicted the Parks' testimony that they treated and occupied the area as part of their backyard.

SUMMARY OF ARGUMENT

This appeal involves no significant question of law, as the elements of a boundary by acquiescence claim are undisputed: (1) occupation up to a visible line marked by monuments, fences, or buildings; (2) mutual acquiescence in the line as a boundary; (3) for a period of at least 20 years; and (4) by adjoining landowners. *Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶6. The burden of proof was on the Parks to establish the elements of the boundary by acquiescence claim. *Brown v. Jorgensen*, 2006 UT App 168, 136 P.3d 1252.[3]

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[3]While the Deans specifically argued that the Parks were required to prove each element of the claim by clear and convincing evidence (*see* Deans' Trial Statement at 3, fn. 1, R. 253; R. 296:183-85), Judge Kennedy did not address the point, apparently convinced that the Parks failed to meet even the preponderance of the evidence standard. *Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶3, an opinion issued by the Utah Supreme Court between the filing of the opening briefs in this case, confirms that the

The Parks failed to present sufficient evidence to prove two of those elements, occupation by the Parks of the Disputed Area and mutual acquiescence in the line as a boundary, particularly for a twenty-year period. Further, while the fence had clearly been in existence for more than twenty years, the Parks did not prove that they had occupied the land for any significant period of time, much less twenty years. Instead, the evidence established that the Disputed Area was simply a neglected and unused narrow strip of land. Much of the strip was steep and rocky; in essence, a retaining area that was not used as a lawn or garden, or for any purpose. The evidence was clear that the fence was installed to provide privacy, not to mark a boundary line, and that purpose was clear to both owners. Indeed, Mrs. Park, as a prior owner of both lots, had knowledge where the actual property line was, and knew the fence was not located on or intended to create a boundary.

The Parks' testimony of the Parks is essential to establish their claims; however, it is important to note that Judge Kennedy specifically found their testimony was not credible on key issues. (R. 269-70.)

ARGUMENT

POINT I

THE PARKS FAILED TO PROVE OCCUPATION OF THE DISPUTED AREA.

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standard of proof is clear and convincing evidence.

As noted by the Parks' brief, in evaluating the occupation requirement, "courts should consider whether a particular "occupation up to a visible line" would place a reasonable party on notice that the given line was being treated as the boundary between the properties." *Bahr v. Imus*, 2011 UT 19, ¶36.[4] Judge Kennedy's findings and conclusions refer to a similar standard, "a pattern of use that is normal and appropriate for the character and location of the land," citing *Englert v. Zane*, 848 P.2d 165, 170 (Utah Ct. App. 1993). The credible evidence, as found by Judge Kennedy, failed to meet even this modest standard.

In particular, the trial court found that there was no credible evidence that the Disputed Area had been occupied or used by the Parks to the extent that the Deans or the prior owners of Lot 9 would have been put on notice of such occupancy and use. On appeal, the Parks cite to various factors that support their version of the truth. The trial court specifically rejected some of the factors relied upon by the Parks as not being credible, and others are simply not evidence of occupancy.

Dr. Park testified about his purported use of the Disputed Area, including seeding grass, weeding, and planting vegetables. Dr. Park's testimony was inconsistent with other

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[4]Occupation and acquiescence tend to rely upon much of the same evidence. In *Essential Botanical*, the Supreme Court held that acquiescence to the fence as the boundary line may be objectively inferred from occupation and use, and the absence of evidence that the record owner of the property disputed that the fence was the boundary. *Essential Botanical*, 2011 UT 71, ¶¶30-31. As will be illustrated below, acquiescence cannot be inferred from the evidence in this case, as the Parks failed to show occupation, particularly to the level that the owners of Lot 9 would have been put on notice that the Parks were asserting ownership of the Disputed Area.

evidence in several respects. The trial court specifically found his testimony regarding use of the Disputed Area, and maintaining a vegetable garden, was not credible. (R. 270.) Hence, the factors relied upon by the Parks in this appeal are not supported by credible evidence.

Even specific testimony from Mrs. Park failed to prove use and occupancy of the Disputed Area to the level required, and there was no evidence from Mrs. Park to establish any use or occupancy after 1988. Indeed, she specifically testified that she almost never went in her backyard after 1993.

While the Deans have only lived in their house since 2005, their observations of the Parks' non-use and non-occupancy of the Disputed Area were consistent with the trial court's findings. Mrs. Dean never observed either of the Parks gardening, tending or planting anything in the Disputed Area.

Photographs of the Disputed Area, while fairly recent, depict a strip of land that is not botanically or visually part of the Parks' backyard. (Ex. 12-28.) The photographs illustrate that the relatively abandoned appearance of the Disputed Area, which includes numerous volunteer trees and undergrowth, has persisted for an extended period of time, such that it is clear the Parks have not cultivated or tended the ground for many years, if they ever did. Even the early photo produced by the Parks fails to show any lawn, gardening or other habitation or use in the Disputed Area. (Ex. B.)

The Parks' evidence of occupation consists of two general positions: (1) that the side yard fence they built prevented entrance by the Deans (and their predecessors) into the

Disputed Area, and (2) that they watered and fertilized the ground, and did not cut down the volunteer trees. Of course, the side yard fence did not create any occupancy of the area by the Parks. The watering and fertilizing was determined by the judge to be, at best, merely incidental and not intentional. And, if allowing volunteer trees to grow constitutes occupancy, then the Deans and their predecessors occupied the Disputed Area also.

The Parks come nowhere close to meeting their burden on appeal. They are required to marshal the evidence that supports the trial court's finding of fact, i.e., that the Parks did not occupy the ground in a manner sufficient to put the Deans and their predecessors on notice of a claim of ownership, and then demonstrate how the evidence is insufficient to support the finding. Particularly in light of the trial court's rejection of the Parks' testimony as not being credible, the Parks have failed to meet this burden.

POINT II

THE PARKS FAILED TO PROVE THE PARTIES ACQUIESCED IN THE FENCE AS THE BOUNDARY LINE BETWEEN THE PARCELS.

Mutual acquiescence in this context requires proof that the parties "recognize and treat an observable line, such as a fence, as the boundary dividing the owner's property from the adjacent landowner's property . . ." *Ault v. Holden*, 2002 UT 33, ¶19, 44 P.3d 781. The purpose for which a fence was erected should be considered, and in some cases the purpose is determinative. *See, e.g., Hales v. Frakes*, 600 P.2d 556 (Utah 1979) (fence constructed to control livestock, rather than to establish a boundary); *Wilkinson Family Farm, LLC v. Babcock*, 1999 UT App 366, 993 P.2d 229 (fence constructed to contain cattle). The court

may also consider the parties' knowledge of the correct boundary line in determining whether there has been acquiescence to a fence as the boundary. *Smith v. Security Investment LTD*, 2009 UT App 355, ¶6. Here, the trial court, having considered the evidence, concluded that the Parks had failed to establish acquiescence to the fence as the real boundary line between Lots 8 and 9. The trial court's findings are well supported by the evidence.

The Parks knew that the fence was not on the record property line. The fence did not follow a straight line (R. 296:34), and it did not align with the chain link fence toward the rear of the property, which was in fact located exactly on the record boundary line. Looking from the front of the house toward the rear, as depicted in Exhibits 7 and 8, it is apparent that the fence jogs. Since Mrs. Park knew that the record lot lines were straight, she would also know that the fence was not on the record lot line.

Even without the testimony of Mr. Clark, the photographs and the topography clearly demonstrate that the fence was built where it was in order to provide privacy, and not to establish a boundary line. The fence followed the crest of the slope, which had been created when Mr. Clark built his home. Had Mr. Clark wished to build the fence on the boundary line, he would have sacrificed any privacy, as the top of the fence would have been only three feet above the level of his backyard. Mr. Clark, being an architect, likely knew the true

boundary lines. Indeed, on the west side, the house is set back almost exactly ten feet from the record boundary line, in conformance with the subdivision requirements.[5]

Mr. Clark's subjective intent in building the fence, assuming he had testified in a manner consistent with the Deans' position, does not establish the absence of mutual acquiescence. *Cf. Essential Botanical*, 2011 UT 71, ¶27. However, where observable factors clearly explain that the fence's location was the product of concerns other than marking a legal boundary, the absence of acquiescence by Mr. Clark and his successors is objectively manifested.

Just about the only evidence in support of the Parks' assertion there was mutual acquiescence is the fact that Mr. Clark and his successors did not access the Disputed Area, and/or that the Parks' short fence blocked such access. However, a lack of access does not establish acquiescence. *See Carter v. Hanrath*, 925 P.2d 960 (Utah 1996) (lack of access to land at the bottom of a cliff does not constitute acquiescence that the top of the cliff is the boundary). In any event, lack of access is merely a factor to be considered, as it was by Judge Kennedy. (R. 274.)

The Parks criticize the trial court's findings regarding Mr. Clark's intent as speculative; however, the evidence makes clear that the fence was placed in a functional and

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[5]If the property line was adjusted to where the fence was located, the side yard setback would be only 5.86 feet. (R. 296:39; Ex. 3.) As the trial court noted, ruling that the Parks were entitled to the Disputed Area would render the Deans' property out of compliance with the Declaration. (R. 276.)

convenient location. Mr. Clark was concerned with privacy from his neighbors, not establishing a legal dividing line between the lots. On the other hand, Mrs. Park had sufficient actual knowledge of the nature and location of the true lot line that the trial court properly concluded that she likewise did not understand and acquiesce to the fence as the true boundary line.[6]

The most recent Supreme Court case on the issue, *Essential Botanical Farms, LC, v. Kay*, 2011 UT 71, ¶26 fn. 38, notes that acquiescence "implies a relationship in which one person takes affirmative actions, and the acquiescing party consents to such action by failing to object." Noting that the strictures of linguistics should not necessarily govern, the Court restated the standard as requiring proof that adjacent landowners "recognized and treated" the line as the boundary. *Id.* The Parks fail to meet their burden under either approach. The Parks cannot point to any action that either they or Mr. Clark (or his successors) took that affirmed that the fence was located on the boundary line; moreover, the Parks cannot point to evidence establishing that either they or Mr. Clark (or his successors) recognized and treated the fence as the boundary. Accordingly, the evidence did not establish mutual acquiescence.

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[6]As noted above, the fact that the Disputed Area was a steep and narrow area, filled with rocks, trees, and roots, and had not been used by the Parks, likewise supports the trial court's finding that the parties had not mutually acquiesced to the fence as the boundary line.

CONCLUSION

For the reasons set forth above, the Court should affirm the trial court.

DATED this 23RD day of November, 2011.

BLACKBURN & STOLL, LC

Bryce D. Panzer
Attorneys for Appellees James D. Dean and Sherlene T. Dean

CERTIFICATE OF MAILING

Monica J. Spehler says that she is employed by the law offices of Blackburn & Stoll, LC, attorneys for appellees James S. Dean and Sherlene T. Dean, and that on the 23RD day of November, 2011, she served the **BRIEF OF APPELLEES JAMES S. DEAN AND SHERLENE T. DEAN** (Utah Ct. App., Case No. 20110427), along with a courtesy CD, upon the following counsel of record by first-class mail, postage prepaid:

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